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August 29, 2000

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals, 445 12th Street, S.W.
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Washington, D.C. 20554

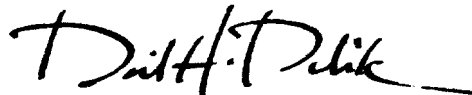
Re: ***Ex Parte Submission of Northpoint Technology, Ltd.***
ET Docket No. 98-206, RM-9147, RM-9245, DA 00-1841

Dear Ms. Salas:

This letter is written to notify you that on August 29, 2000, Northpoint Technology, Ltd. made a written *ex parte* presentation to the Chairman, the Commissioners, and several members of the Commission staff urging action on the applications filed on January 8, 1999 by companies affiliated with BroadwaveUSA.

An original and eight copies of this letter, the written presentation, and its service list are submitted for inclusion in the public record for the above-captioned proceedings. Please direct any questions concerning this submission to the undersigned.

Sincerely,



David H. Pawlik
Counsel for Northpoint Technology, Ltd.
and BroadwaveUSA

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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Amendment of Parts 2 and 25 of the)	
Commission's Rules to Permit Operation)	
of NGSO FSS Systems Co-Frequency with)	
GSO and Terrestrial Systems in the Ku-)	ET Docket No. 98-206
Band Frequency Range)	RM-9147
and)	RM-9245
Amendment of the Commission's Rules)	DA 00-1841
to Authorize Subsidiary Terrestrial Use)	
of the 12.2-12.7 GHz Band by Direct)	
Broadcast Satellite Licensees and Their)	
Affiliates)	

EX PARTE SUBMISSION OF NORTHPOINT TECHNOLOGY, LTD. AND BROADWAVEUSA

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Dated: August 29, 2000

EX PARTE SUBMISSION OF NORTHPOINT TECHNOLOGY, LTD. AND BROADWAVEUSA

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**EX PARTE SUBMISSION OF
NORTHPOINT TECHNOLOGY, LTD. AND BROADWAVEUSA**

I. Summary

On January 8, 1999, companies affiliated with BroadwaveUSA (the "Broadwave Affiliates") filed applications (the "Broadwave Applications") proposing to implement proprietary technology developed by Northpoint Technology, Ltd. (collectively with BroadwaveUSA, herein, "Northpoint") for the provision of terrestrial services in the 12.2-12.7 GHz band (the "Ku Band"). This technology will not only usher in a new era of competitive, low-cost, broadband services to the American public, but it will also answer the demand for more spectrum resources by permitting terrestrial and satellite services to share the Ku

Band. Although it has been over a year and a half since the filing, the Commission has yet to take any action on these applications.

The purpose of this filing is to urge the Commission to promptly accept the Broadwave Applications for filing and to grant them. These applications were tendered within a filing window for the frequencies they propose to use. The filing window was established within a rulemaking proceeding in which terrestrial services were proposed and discussed and, in fact, Northpoint's specific technology and service proposals were explicitly referenced and placed under public scrutiny. Thus, the Commission gave more than adequate notice that parties intending terrestrial use of the Ku Band must file within the announced window. However, no other applicant filed within the window seeking authority to provide terrestrial services in the Ku Band, nor has any other party come forward with technology that has been demonstrated capable of sharing spectrum with satellite operators. Northpoint has demonstrated the ability of its technology to operate without causing harmful interference to the Direct Broadcast Satellite Service ("DBS") and to co-exist with the proposed non-geostationary satellite orbit fixed satellite service ("NGSO FSS") systems. Accordingly, the Broadwave Applications are not mutually exclusive with any other applications and can be granted following a thirty-day notice period, without the need for another filing window or for competitive bidding. In any case, as discussed below, competitive bidding is prohibited by the ORBIT Act and the Commission must also comply with the mandate of SHVIA to make

determinations regarding applications such as the Broadwave Applications by November 29, 2000.

Furthermore, the public interest and fundamental fairness will be served by granting the Broadwave Applications without auctions. The NGSO operators who applied on the same day to use the Ku Band spectrum have requested a cumulative total of 24,360 MHz¹ to be used for services that will be available to only a handful of wealthy subscribers, while the Broadwave Affiliates seek only 500 MHz to provide a low-cost service aimed at bringing multichannel video competition to the mass consumer market. The Commission has treated Northpoint and the NGSO applicants the same throughout these proceedings. Quite appropriately, no

¹ See “Application for Satellite Space and Earth Station Authorization,” Teledesic LLC, SAT-LOA-19990108-00005, Jan 8, 1999 (seeking 3.75 GHz); “Application For Satellite Space and Earth Station Authorization,” Hughes Communications, Inc., SAT-LOA-19990108-00003, Jan 8, 1999 (seeking 3.8 GHz); “Application of Virtual Geosatellite, LLC for Authority to Launch and Operate a Global System of Non-geostationary Satellites in Sub-geosynchronous Elliptical Orbits,” SAT-LOA-19990108-00007 (seeking 4 GHz); “Amendment to Application of SkyBridge L.L.C. for Authority to Launch and Operate the SkyBridge Satellite System File Nos. 48-SAT-P/LA-97, 89-SAT-AMEND-97, and 130-SAT-AMEND-98,” SkyBridge L.L.C., Jan 8, 1999 (seeking 3.65 GHz); “Application of Denali Telecom, LLC, Consolidated System Proposal for Authority to Launch and Operate Thirteen Satellites in the Pentriad System,” 160-SAT-P/LA-97/13, September 26, 1997, and “Clarification of Denali Telecom, LLC Application,” SAT-AMD-19990108-00001, January 8, 1999 (seeking 6.2 GHz); and “Application for Authority to Launch and Operate a Non-geostationary Medium Earth Orbit Satellite System in the Fixed Satellite Service,” SAT-LOA-19990108-00006, the Boeing Company, January 8, 1999 (seeking 2.96 GHz).

one has hinted that the NGSO applications should be subject to auction. The idea of subjecting the Broadwave Applications to competitive bidding should be equally unheard and rejected.

II. The Broadwave and NGSO Applications Are Ripe for Consolidated Action and the Broadwave Applications Should Be Accepted for Filing and Promptly Granted.

In 1997, SkyBridge, L.L.C. ("SkyBridge") filed a Petition for Rulemaking seeking authority to use the Ku Band to operate an NGSO FSS system. In March of 1998, Northpoint filed a Petition for Rulemaking to use the Ku Band to facilitate competition to cable and DBS operators.² In November 1998, the Commission established a cut-off date of January 8, 1999 for applications in the Ku Band³ and initiated a consolidated rulemaking on the SkyBridge and Northpoint petitions.⁴ Since that time, the Commission staff has treated the NGSO applicants and Northpoint as mutually exclusive, encouraging the parties to negotiate and seek

² See Northpoint Technology Petition for Rulemaking to Modify Section 101.147 (p) of Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Digital Broadcast Satellite Licensees and Their Affiliates, filed March 6, 1998.

³ See International Bureau Satellite Policy Branch Information: Cut-off Established, Public Notice, Report no. SPB-141, 1998 WL 758449 (Rel. Nov. 2, 1998) ("Ku Band Cut-off Public Notice") (January 8, 1999 the "Ku Band Cut-off Date").

⁴ See Amendment of Parts 2 and 25 of the Commission's Rules To Permit Operation of NGSO FSS Systems, Notice of Proposed Rulemaking, 14 FCC Rcd 1131, ET Docket No. 98-206 (Rel. Nov. 24, 1998) ("NPRM").

technical solutions to spectrum-sharing issues. It is clear that were Northpoint unable to demonstrate that it could share with both the NGSO and DBS systems, there would be no spectrum allocated for the Northpoint technology.

In the NPRM, the Commission explicitly stated that it would include in the Ku Band proceeding the type of terrestrial services proposed by Northpoint because "Northpoint [was] requesting that its terrestrial services be permitted to operate in some of the same spectrum requested by SkyBridge, LLC."⁵ In fact, the Commission stated that it was "undertak[ing] this proceeding to address the spectrum sharing issues presented by SkyBridge's and Northpoint's proposed use of spectrum in the Ku-band range," and sought comment on whether NGSO FSS and Northpoint would be able to share the same spectrum.⁶ In a separate statement, Chairman Kennard emphasized that the proceeding involved extremely complicated and novel spectrum sharing scenarios involving both satellite and terrestrial services.⁷

In their January 8, 1999 applications, the Broadwave Affiliates presented the Northpoint technology to the Commission in a timely manner so that the issues of terrestrial sharing could be resolved in connection with the NGSO

⁵ *Id.* at ¶ 8.

⁶ *Id.* at ¶¶ 9 and 96-97.

⁷ Press Statement of Chairman William E. Kennard, November 19, 1998 ("Kennard Statement").

processing round. On March 11, 1999, the Commission issued a Public Notice regarding the Broadwave Applications, noting that they sought the use of the Ku Band and that they were filed within the Ku Band filing window.⁸ The Commission did not, however, accept them for filing, but instead, noting the policy implications and potential impact of the Broadwave Applications, requested comments from interested parties. On March 23, 1999, the Commission accepted for filing the NGSO FSS applications that were filed within the Ku Band filing window.⁹

In the time since the Ku Band cut-off date, the NGSO applicants and Northpoint have demonstrated to the Commission the feasibility of spectrum sharing among themselves and with DBS providers operating in the Ku Band. Indeed, on March 8, 2000, following exhaustive technical discussions, one of the NGSO applicants, Virtual Geosatellite, LLC, and Northpoint addressed a letter to Chairman Kennard in which they stated that both of their systems can be operated as designed without any undue burdens upon either system from the other.¹⁰ Additionally, on July 10, 2000, SkyBridge filed an ex parte letter stating the circumstances under which the SkyBridge system could also co-exist with Northpoint.¹¹

⁸ Public Notice DA 99-494, (released March 11, 1999; corrected on the same day with regard to the number of markets involved).

⁹ Report No. SAT-00013 (March 23, 1999).

¹⁰ Ex Parte Submission of Northpoint Technology, Ltd., March 8, 2000.

¹¹ Ex Parte letter of Jeffrey H. Olsen, attorney for SkyBridge, July 10, 2000. Northpoint filed a response to this letter on July 11, 2000, objecting to the

On April 18, 2000, over a year after the Ku Band cut-off date, PDC Broadband Corporation filed an application to provide terrestrial services in the Ku Band.¹² Northpoint filed a Motion to Dismiss this application because it was untimely filed outside of the Ku Band cut-off window, it failed to provide any technical showing or demonstration of technology capable of sharing with DBS operations, and, given its inconsistency with positions taken by its parent company, it was an anticompetitive attempt to forestall competition to DBS and involved a lack of candor before the Commission. The Commission has not taken any action on Northpoint's motion.

As Northpoint has previously explained to the Commission,¹³ the public notice that established the filing window for satellite applicants in the Ku Band was sufficient to put anyone wishing to use the band for any reason on notice that applications were then necessary. Terrestrial services in the Ku Band are so

restrictive and unacceptable power levels that SkyBridge would impose on Northpoint. Nevertheless, SkyBridge's assertion that there is a regulatory framework under which Northpoint and SkyBridge could operate on a co-frequency basis is exceptionally significant given earlier statements to the contrary by NGSO applicants.

¹² PDC Broadband Corporation, Applications for Licenses to Provide Terrestrial Services in the 12.2-12.7 GHz Band in All DMAs, April 18, 2000. PDC Broadband Corporation is an affiliate of Pegasus Satellite Television, the largest independent distributor of DirecTV's DBS services.

¹³ See Motion to Dismiss PDC Broadband Corporation Application to Provide Terrestrial Services in the 12.2-12.7 GHz Band, May 23, 2000 and Reply to Opposition (to Motion to Dismiss), June 19, 2000.

fundamentally and uniquely intertwined with the NGSO FSS proceeding that the failure to so file and to participate in negotiations with others who filed in the window would very likely have resulted in the adoption by the Commission of rules that would forever preclude any terrestrial sharing of the band.

The standard for the adequacy of notice for a filing window is not that the agency have made “the clearest possible articulation, only that, based on a ‘fair reading’ of its order, the petitioners knew or should have known what the Commission expected of them.”¹⁴ Moreover, the notice requirement is satisfied “so long as the Commission’s actions [give] notice of the cut-off date that [is] reasonably comprehensible to people of good faith.”¹⁵

Once a filing window has closed, it should be reopened only in

¹⁴ See McElroy Electronics Corporation v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993) (“McElroy I”) (finding that applications filed in response to a Commission order were timely filed, even though the order did not explicitly state that a window for such applications was open), *citing* RCA Global Communications, Inc. v. FCC, 758 F.2d 722 (D.C. Cir. 1985).

¹⁵ See McElroy Electronic Corporation v. FCC, 86 F.3d 248, 257 (D.C. Cir. 1996) (“McElroy II”). The McElroy I court ordered the Commission to reinstate applications that had been dismissed as prematurely filed, but the Commission decided that those reinstated applicants would be entered in a lottery with some 500 other parties who had filed after the original parties but before the Circuit Court’s decision in McElroy I. In McElroy II, the D.C. Circuit Court instructed the Commission to dismiss the 500 later-filed applications because they were not entitled to compete with the more timely reinstated applications.

"extraordinary circumstances."¹⁶ In the 1997 DARS proceeding, the Commission declined to reopen the satellite cut-off window in order to "expeditiously provide new services to the public."¹⁷ The Commission emphasized that in the case of satellite applications, cut-off procedures provide a greater measure of certainty and such "applicants require some measure of certainty to justify the inherently long-term investment of resources."¹⁸ The Commission further stated that although it had "authority to reopen cut-offs . . . compelling policy reasons unique to satellite services militate against reopening the cut-off for satellite."¹⁹ Similar to the DARS proceeding, there are no compelling circumstances in the present situation that would merit reopening a filing window. To the contrary, the public interest compels the speedy introduction of services to the public that will flow from the grant of the Broadwave Applications.²⁰

¹⁶ See Establishment of Rules and Policies for the Digital Audio Radio Satellite Service, 12 FCC Rcd 5754, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, IB Docket No. 95-91 (1997) ("DARS proceeding").

¹⁷ See DARS proceeding at ¶ 67.

¹⁸ Id.

¹⁹ Id. at 66.

²⁰ Furthermore, as discussed more fully below, there is no reason to delay the process for competitive bidding. Section 309 (j) of the Communications Act, 47 U.S.C. § 309 (j)(6)(E), requires that, prior to sending an applicant to auction, the Commission must determine that mutual exclusivity *cannot* be avoided by using "engineering solutions, negotiation, threshold qualifications, service regulations, and other means in . . . application and licensing proceedings." The record in the Ku Band proceeding clearly demonstrates that Northpoint's patented technology permits sharing with

III. Given the Public Interest Benefits of the Prompt Initiation of New Competitive Services, the Commission Should Not Re-open the Cut-off Window to Impose Auctions on the Terrestrial Ku Band.

Northpoint understands that some have suggested that the Commission should reopen the filing window and call for additional applications for terrestrial services in the Ku Band. If additional applications are filed, terrestrial services, but not satellite services, would be auctioned. Singling out the Broadwave Applications for auction after the Broadwave Affiliates have demonstrated their ability to share the spectrum with the satellite applicants that applied within the same window for the same spectrum would be unfair to all of the applicants and disserve the public interest. Not only are there no compelling circumstances warranting waiver of the cut-off rules, but the use of auctions to award licenses for use of the Ku Band would directly contravene a recently enacted Congressional mandate.

A. Implementation of Auction Procedures at this Late Date Would Be Arbitrary and Capricious and Could Severely Chill the Development of New Technologies.

Granting the satellite applications while putting the Broadwave Applications out for auction would severely prejudice the Broadwave Affiliates. The

satellite users of the band. It also shows that the Broadwave Affiliates would be able to share the spectrum with any other terrestrial users who can also share the band with satellite operators. *See* Experimental Progress Report, WA2XMY – Washington, D.C., filed by Diversified Communications Engineering, Inc. on October 13, 1999, at figure 1-3, demonstrating that two Northpoint transmitters can each provide service to overlapping areas.

Commission would deny the Broadwave Affiliates the ability to effectively negotiate spectrum capacity with the satellite applicants and place Northpoint and the Broadwave Affiliates at the unfortunate “pivot point” between two different sets of negotiations.

Northpoint has demonstrated that its technology is not mutually exclusive with the NGSO applicants pursuant to Section 309 (j) of the Communications Act and has negotiated for what can be considered an “interference budget,” *i.e.* the small amount of additional noise that Northpoint could generate without causing unacceptable interference to incumbent DBS operators. If the Commission were to open a new application window for terrestrial services, Northpoint would be subjected to again proving that it is not mutually exclusive through additional negotiations with new applicants, probably by giving up some or all of its interference budget to newcomers.

As discussed above, the Ku Band Cut-Off Notice provided adequate notice to anyone interested in providing service in the band that applications needed to be filed prior to the cut-off date. The Commission thus knew the universe of both satellite and terrestrial applicants in January of 1999 as it and the parties worked out the sharing criteria. Since that time, the Commission has devoted over 19 months, countless meetings, and the review of 500-plus filings submitted by the satellite applicants and Northpoint. Any sharing decision will presumably be based on the

current record and essentially divide up the interference budget among Northpoint and the seven satellite applicants. If other parties had brought to the attention of the Commission terrestrial technologies that could share with the satellite applicants and the DBS operators 19 months ago, there might have been a different sharing result.²¹ It would be extremely unfair to Northpoint for the Commission to now call for other terrestrial applicants and require Northpoint to share its cut of the interference budget with such new entrants. Additionally, the resulting shares of the interference budget for terrestrial operations will likely be too small to allow a viable service.

After 19 months of deliberation and over 500 filings, it is far too late to stop and call for new applications and start from scratch to reallocate the interference budget and re-evaluate all the technical parameters that have been agreed upon after so much effort. The fact that the Commission treated Northpoint as mutually exclusive with the NGSOs and that now the parties have identified ways to share the resource should be determinative. This proceeding is ripe for conclusion and consumers are waiting for new services. Delay in this case has no public interest benefit whatsoever.

Imposing auctions on terrestrial applicants and not on satellite

²¹ This assumes, for the sake of argument, that such other technologies exist, although none have surfaced to date and, indeed, patented Northpoint technology is the only system to have ever demonstrated a viable method of ubiquitous satellite-terrestrial sharing at any point in the Commission's history.

applicants would represent a marked change in the Commission's licensing and regulatory policy for the Ku Band²² and it would also be unfair to Northpoint, the NGSO applicants, and the Commission staff who have dedicated countless hours, at Commission urging, to working out satellite/terrestrial sharing issues. Northpoint and the NGSO applicants all filed applications to use the same spectrum within the same filing window. Since January 8, 1999, the Commission staff has treated Northpoint and the NGSO applicants as mutually exclusive, first, by requiring the NGSO applicants and the Broadwave Affiliates to demonstrate that they can share with one another (in addition to sharing with the DBS operators), and second, by encouraging them to work together to reach solutions to such sharing issues. Now that Northpoint has resolved the sharing issues with both the highest elevation satellite system, Virtual Geosatellite, LLC, and the lowest elevation system, SkyBridge, it would be unreasonable for the Commission to do an about-face and determine that NGSO licenses may be granted without consideration of the Broadwave Applications and that the latter must be held up for processing with any

²² The Commission's International Bureau, which has been considering the Ku Band issues, generally permits applicants to demonstrate that they can share spectrum and when they can make such a showing, awards authorizations without competitive bidding. The procedures followed by the Commission's Wireless Telecommunications Bureau, on the other hand, generally involve the establishment of service rules, a call for applicants, and an auction. Division of jurisdiction over the Ku Band between bureaus based on terrestrial as opposed to satellite use of the same frequencies should not result in such a significant discrepancy in the treatment of applicants, particularly when the parties applied at the same time and will operate on a co-channel basis within the same spectrum resource based on a rulemaking intended to facilitate such sharing.

new terrestrial applicants that might be deemed mutually exclusive. Both the Communications Act and the Commission's precedent provide the authority for the Commission to accept the Broadwave Applications for filing, seek comment, and then grant them in the same manner as the Commission will grant the NGSO applications.²³

Indeed, subjecting the Broadwave Applications to auction would represent a sharp departure in the Commission's stated policies for the Ku Band, an abrupt change in course that the Commission could not reasonably articulate or defend.²⁴ The Communications Act requires the Commission to make services available that are in the public interest, convenience and necessity.²⁵ This mandate includes the obligation to promote new technologies and the efficient use of spectrum.²⁶ To this end, the Commission should encourage technologies such as Northpoint's that create new spectrum resources and encourage efficiency. A requirement to twice prove that an applicant's technology and service plans are not mutually exclusive, with regard to two different pools of applicants, would punish, not encourage, innovation.

²³ See 47 U.S.C. § 309 and McElroy I, *supra* note 14.

²⁴ See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852, (D.C. Cir. 1970) ("an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored").

²⁵ 47 U.S.C. § 151.

²⁶ 47 U.S.C. § 157.

Any new applicants for the Ku Band would need to begin coordination and negotiation with NGSO applicants anew. They would have to develop their own proprietary systems and be subjected to the same degree of scrutiny as Northpoint's system. This process would ultimately result in the further delay of implementation of innovative competitive services from both NGSO FSS operators and the Broadwave Affiliates, which has been the purpose of the Ku Band proceedings.

Finally, if the Commission were now to decide, more than a year after the cut-off window closed, to treat the satellite and terrestrial applicants differently and to hold an auction only for terrestrial applicants in the Ku Band, the Commission would violate its fundamental obligation to engage in reasoned decision-making.²⁷ The Commission would have to ignore the interdependence of terrestrial and satellite operations sharing the same frequencies and make a decision based, not on "a reasoned consideration of relevant factors,"²⁸ but on a purely arbitrary basis. The Broadwave Affiliates and the NGSO FSS applicants are similarly situated – all filed

²⁷ The requirement of reasoned decision making is longstanding in administrative law, and courts have continuously insisted that an agency "articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts." It is this course that "assure[s] that the agency's policies effectuate general standards applied without unreasonable discrimination." See Greater Boston Television Corporation v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970); see also WAIT Radio v. FCC, 418 F.2d 1153, 1156 (D.C. Cir. 1969); City of Chicago v. F.P.C., 385 F.2d 629 (D.C. Cir. 1967).

²⁸ See Western Union Intl. v. FCC, 610 F.Supp. 1489, 1502 (1985).

applications to provide services utilizing the Ku Band during the same filing window in the same proceeding. It is not enough to find superficial differences between parties; the Commission must explain the relevance of those differences to the purposes of the Communications Act.²⁹ Thus, if the Commission were to impose an auction requirement on one applicant and not the others, its action would be arbitrary and capricious.

B. The Orbit Act Prohibits Auctioning Frequencies Used for Satellite Services.

The ORBIT (Open-Market Reorganization For the Betterment of International Telecommunications) Act expressly prohibits the Commission from assigning through competitive bidding "any spectrum used for global satellite communications services."³⁰ The prohibition is not limited to authorizations to *operate* a satellite service. The auction prohibition also extends to all other services, applicants, and licensees that *use* spectrum designated for global satellite uses, such as terrestrial microwave. Because the Ku Band is designated for global satellite use and the terrestrial service proposed in the Broadwave applications shares the same frequencies as satellite services, the Commission cannot use competitive bidding to resolve any mutually exclusive applications for terrestrial use in the Ku Band without

²⁹ Garrett v. FCC, 513 F.2d 1056, 1060, 1061 (D.C. Cir. 1975); Melody Music, Inc. v. FCC, 345 F.2d 730, 732, 733 (D.C. Cir. 1965).

³⁰ P.L. 106-180, § 647 (Mar. 17, 2000).

violating the ORBIT Act.

Global satellite communications systems have claimed that they can only operate effectively if they have use of the same spectrum across international boundaries. The ORBIT Act auction ban reflects a Congressional determination that submitting satellite spectrum to auction could severely delay or even prevent the implementation of such global systems. If the U.S. and other countries auctioned satellite spectrum, the creation of global satellite systems could be hampered. Similarly, allowing auctions for terrestrial service using the same frequencies could result in the awarding of licenses to a high bidder that, unlike Northpoint, cannot co-exist with NGSO operators, thus also hindering the development of global satellite services. Accordingly, the language of the ORBIT Act correctly applies to the spectrum, not to the specific uses of such spectrum, and an FCC auction of the spectrum for terrestrial use is no less contrary to the purposes of the auction ban than an auction for satellite services.

IV. The SHVIA Requires Commission Action by November 29, 2000.

Prompt action on the Broadwave Applications (by November 29, 2000) is required to fulfill the FCC's obligations under Title II of S.1948, section 2002 ("Section 2002") subsection (a) of the Satellite Home Viewer Improvement Act ("SHVIA"), which states:

“Not later than 1 year after the date of enactment of this Act, the Federal Communications Commission (“the Commission”) shall take all actions necessary to make a determination regarding licenses or other authorizations for facilities that will utilize, for delivering local broadcast television station signals to satellite television subscribers in unserved and underserved local television markets, spectrum otherwise used for commercial use.”³¹

The Broadwave Applications unquestionably meet the qualifying tests for consideration under this provision. First, Northpoint has demonstrated in its Washington testing that it is technically feasible to provide local television signals to the same location and user as satellite television signals. Based on this technical feasibility, the Broadwave Affiliates have created a business plan to carry local television signals and offer them to satellite television subscribers and have, in fact, committed to carry all local stations in all local markets from their first day of operation in each market with a full “must carry” obligation. In addition, several members of Congress specifically referred to Northpoint and/or the Broadwave Affiliates in their floor statements accompanying the legislation.³² Clearly, Section 2002 applied to the Broadwave Applications.

When Section 2002 states that the Commission will make “a determination” of licenses, it means that the Commission will make a final

³¹ Pub L. No. 106-113, 113 Stat. 1501, Appendix I, § 2002. The SHVIA was enacted on November 29, 2000.

³² *See* statements of Congressman Markey (Nov 9, 1999 at p. H11186); Senator Leahy (Nov. 19, 1999 at p. s 15023); *see also* statement of Senator Kerry, Nov. 19,1999 at p. S15016.

disposition by granting or denying license applications for facilities such as those to be operated by the Broadwave Affiliates. It is fair to say that when Congress required the FCC to make a determination on “licenses,” it expected the FCC to act finally by granting or denying licenses, not simply to issue an order in a rulemaking. The Senate Report states the purpose of the provision: to “encourage the FCC to approve needed licenses (or other authorizations) to provide local TV service in rural areas, the Commission is required to make determinations regarding needed licenses within one year of enactment.”³³ Clearly, Congress hoped that the FCC would approve licenses that will increase the available means of delivery for local television to subscribers of satellite television services.

That “determination” means final action on license applications also is clear from subsection (c) of Section 2002 which calls for an FCC report to Congress to be made by January 1, 2001 on the “extent to which licenses and other authorizations under subsection (a) have facilitated the delivery of local signals to satellite television subscribers in unserved and underserved local television markets.” Congress anticipated the grant of authorizations that further the goal of bringing local signals to satellite subscribers, something to be accomplished through the FCC’s “determination.” Approval of the Broadwave Applications would fulfill the goals of Section 2002 and provide a very favorable report to Congress next year, as the Broadwave Affiliates are committed to commence service within six months of

³³ See, S.14712. Nov. 17, 1999.

licensing within target markets and on a nationwide basis, including in the most rural areas, within two years.

V. The Public Interest Will Be Served by Promptly Granting the Broadwave Applications.

Northpoint's network of Broadwave Affiliates are a highly diverse group of new entrants, unaffiliated with any current content or service providers. They intend to compete with incumbent cable monopolists and DBS operators. Like Northpoint's technology, Northpoint's service offering and affiliate network are unprecedented in the Commission's history. The grant of the Broadwave Applications will allow the Commission to make historic progress on at least nine of its most elusive public interest goals.

- **Prompt Service To The Public:** The Broadwave Affiliates have committed to initiate digital multi-channel video and broadband services, including providing local television to DBS subscribers in target markets within six months of licensing and within all 210 television markets within two years of licensing.

- **Digital Divide:** Northpoint's low-cost infrastructure and rapid deployment potential make it uniquely suited to addressing the digital divide by offering low-cost digital services in both rural and urban markets.

· **Spectrum Efficiency:** The Commission does not need to clear a band for Northpoint's use. Terrestrial re-use of the Ku Band was unknown prior to Northpoint's patented technology. Northpoint has therefore created the bandwidth it seeks to use.

· **New Entrants:** All of the Broadwave Affiliates are new entrants to the multichannel video distribution and broadband service marketplace.

· **Diversity Of Voices:** Once licensed, the Broadwave Affiliates will comprise a new nationwide video and data network, unaffiliated with any current content or service providers. This new platform for programming and content will thus present a true alternative to both viewers and program providers.

· **Price Competition To Cable:** Northpoint's low-cost infrastructure will allow the Broadwave Affiliates to offer services at substantially lower prices and bring true price competition to the cable industry for the first time. While DBS is an available alternative to cable, the introduction of DBS has not resulted in price competition or cost savings to consumers.³⁴ Even though

³⁴ See, *Annual Assessment of the Status of Competition in the Markets for Delivery of Video Programming*, Sixth Annual Report, CS Docket No. 99-230, FCC 99-418 15 FCC Rcd. 978 (adopted 12/30/99, released 1/14/00)

direct competition from another wireline service in the same community has caused incumbent cable operators to reduce their prices for programming services and equipment, less than one half of one percent (0.5%) of the cable communities nationwide have effective competition.³⁵ Thus, without the services offered by the Broadwave Affiliates, over 99.5% of the country's cable communities will be deprived of price competition in the market for video programming services.

- **Rural Infrastructure:** Northpoint's low-cost repeater infrastructure can provide new digital wireless services in rural areas, most of which have no other realistic prospect for such services from other broadband providers.

- **Local Signal To Customers Of DBS:** Northpoint's Broadwave Affiliates have committed to carry all local broadcast television channels from the first day of operation in even the smallest market. In fact, Northpoint's patented design will allow DBS and terrestrial services to be combined and serve a single television set.

("Sixth Annual Assessment"), ¶ 245.

³⁵ In the *Sixth Annual Assessment*, the Commission stated that, of the 33,000 cable communities nationwide, only 157 have been certified by the Commission as having effective competition as a result of consumers having a choice of more than one wireline multi-channel video programming distributor. *Id.* at ¶ 140.

· Participation By Women And Minorities: Granting the Broadwave Applications would be the single greatest action ever taken in Commission history to diversify the ownership of communications resources. Women or male minorities control 80% of all Broadwave Affiliates – yet these applicants seek no special treatment. They only ask to be allowed to use a spectrum resource that was unknown to the Commission before they developed Northpoint's patented technology and demonstrated its effectiveness.

During the years that Northpoint has been before the FCC, it has worked hard to earn the Commission's approval for its technology and now the Broadwave Affiliates merit licensing without further delay. It is completely within the Commission's discretion to expeditiously grant the Broadwave Applications and allow Northpoint's technology and unprecedented affiliate network to bring vital competition to the public and otherwise further the agency's public interest goals.

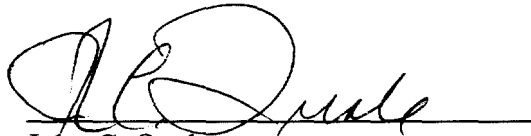
VI. Conclusion.

Accordingly, the Commission should adhere to Congressional mandates in the ORBIT Act, SHVIA, and Section 309 (j) and approve the Broadwave applications. The public interest will be well served by an expeditious determination in these matters so that interested and capable providers can begin offering new competitive services in the Ku Band.

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Dated: August 29, 2000

CERTIFICATE OF SERVICE

I, Clark S. Taylor, hereby certify that a copy of the foregoing Ex Parte submission of Northpoint Technology, Ltd., this 29th day of August, 2000, has been delivered via courier and first class U.S. mail (*) to the following:

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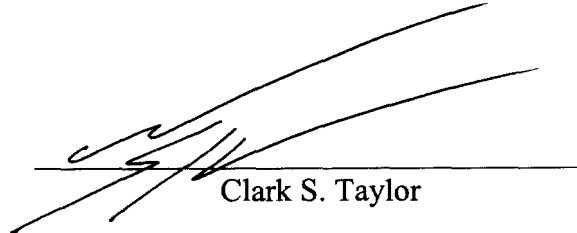
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